Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

MAY LINDA HEYWARD,

Petitioner,

v.

MICHAEL C. MONROE, individually and in his official capacity as District Director of Health Education for the South Carolina Department of Health and Environmental Control and SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the judgment of the Court of Appeals that the Petitioner was not discriminated against compared to other employees because her dismissal was not similar to theirs in all relevant respects conflicts with decisions of this Court and of other Courts of Appeals requiring only that the misconduct of the plaintiff and of other employees be of comparable seriousness.

LIST OF PARTIES TO PROCEEDING BELOW

The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

There are no parent companies or nonwholly owned subsidiaries involved in this case.

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OPINIONS AND ORDERS BELOW

The Magistrate Judge's Report and Recommendation, which recommended dismissal of the Plaintiffs' claims in Civil Action No. 3:95-3400-23, with the exception of Petitioner Heyward's claim for disparate treatment under Title VII against Respondent South Carolina Department of Health and Environmental Control (DHEC), is not reported.

The Order of the United States District Court in Civil Action No. 3:95-3400-23, adopting in part the Report and Recommendation of the United States Magistrate Judge, and entering summary judgment for the Respondents on all claims, is not reported.

The United States Court of Appeals for the Fourth Circuit issued an unpublished per curiam opinion in Case No. 97-2430 affirming the decision of the United States District Court.

The United States Court of Appeals for the Fourth Circuit issued an unpublished opinion in Case No. 97-2430 denying the Petitioner's petition for rehearing.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on December 7, 1998. The judgment of the United States Court of Appeals for the Fourth Circuit denying the Petitioner's petition for rehearing was entered on January

25, 1999. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a) provides, in pertinent part, as follows:

> **(a) Employer practices.** It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as

an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

May Linda Heyward (Heyward) is a black female who was employed by Respondent South Carolina Department of Health and Environmental Control (DHEC) continuously from September 17, 1987 until her termination in January 1992. During her tenure at DHEC, Heyward had an excellent employment record and a reputation for dependability, loyalty, diligence, and progressive approaches, as well as for her community contributions.

In November 1988, Heyward sought a promotion, but the position was given to Respondent Monroe, a white male who was no better qualified than Heyward and who had less or no seniority in the department in which the vacancy existed, while Heyward did have seniority in that department. From about the time that Monroe became Heyward's supervisor, he harassed her and subjected her to discriminatory treatment. On March 16, 1989, for example, Monroe issued Heyward a written reprimand for attending a meeting which was an integral part of her job duties, but which he had instructed her not to attend "due to the higher priority" of meeting with him concerning her performance appraisal. In April/May 1991, similarly, Monroe gave Heyward an action plan notifying her that she was strictly to account for where and with whom she

would be at all times and that he would be checking on her whereabouts. In fact, Monroe continuously monitored Heyward, almost to the point of stalking. On November 15, 1991, Monroe issued another reprimand on Heyward for negligence in following rules.

In April 1989, Heyward complained to the State Human Affairs Commission, which contacted DHEC and attempted to informally resolve the matter. Notwithstanding those efforts by the Commission to resolve the matter, Monroe continued his discriminatory treatment of Heyward. Ultimately, at the first technical opportunity to do so, he terminated Heyward's employment on January 27, 1992, based on the allegation that she had abandoned her position by not coming to work for three consecutive days. Heyward's absence from employment on January 22-24, 1992 was due to an illness which was sufficiently severe that she was unable to report to work. Under DHEC's Employee Handbook, an employee who cannot report to work due to illness is to notify his or her supervisor "as soon as possible." On January 22, Heyward informed Monroe's secretary that Heyward would be unable to report to work. On January 23 and 24, Heyward continued her efforts to speak directly with one or more of her supervisors, but was unable to do so as a result of their unavailability. Notwithstanding the fact that Heyward had directly notified Monroe's secretary of her absence and the reason therefor, Monroe terminated Heyward from her employment on January 27, stating as his basis that Heyward had failed to contact her work area during the three-day period and had, accordingly, abandoned her employment.

The Employee Handbook provides only that if an employee cannot report to work because of illness, the supervisor should be notified "as soon as possible." Whatever the formal policy, the informal policy was one of leniency. During the period of Heyward's employment, seven other employees of DHEC were terminated for job abandonment, but under circumstances in which, unlike in Heyward's case, they were given reasonable notice and an opportunity to explain their absence from work. For example, one white female employee who failed to return to work under similar circumstances, with the difference that she was given written notice that she would be terminated if she did not return by a particular date, was not terminated until a full week after the designated date. Another white employee, who failed for three weeks to either return to work or respond to a letter of inquiry concerning her return, was then terminated, not as of the date of the letter but as of two days thereafter.

On October 16, 1995, Heyward filed a complaint in the United States District Court of the District of South Carolina, Columbia Division. The complaint stated a number of causes of action, including claims that the Respondents discriminated against Heyward because of her race and gender in violation of 42 U.S.C. § 2000e (Title VII) and 42 U.S.C. § 1983, that the Respondents had retaliated against her for filing an informal complaint with the South Carolina Human Affairs Commission concerning her treatment by her immediate supervisor, Respondent Michael C. Monroe, in violation of Title VII, and that the Respondents deprived Heyward of various constitutional rights in violation of § 1983. The complaint also raised several state law claims for breach of contract, breach of the implied covenant of good faith and fair

dealing contained in her contract, and violation of the public policy of South Carolina, as well as a claim by Earl Samuel, Heyward's husband, for loss of consortium.

The case was assigned to the Honorable Joseph R. McCrorey, Magistrate Judge. On January 16, 1997, Judge McCrorey filed a Report and Recommendation in which he concluded that the Petitioner's § 1983 claims and state law claims should be dismissed as being barred by the statute of limitations. (A-21.) He also recommended dismissal of Heyward's claim for a violation of the public policy of South Carolina as not stating a viable cause of action, and the dismissal of Samuel's loss of consortium claim on the ground that Samuel and Heyward were not married at the time of the injury. The Magistrate did, however, recommend the denial of the Respondents' motion for summary judgment as to Heyward's Title VII claim of discrimination based on race and gender, but recommended dismissal of Respondent Monroe in his individual capacity.

On September 16, 1997, the United States District Court, adopting in part the Report and Recommendation of the Magistrate Judge, entered an Order granting summary judgment in favor of the Respondents on all counts. (A-11.)

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court on December 7, 1998 (A-2), and denied the Petitioner's petition for rehearing on January 25, 1999. (A-1.)

The district court had subject-matter jurisdiction over this matter by virtue of 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. §§ 1331 and 1343, and the court's supplemental jurisdiction under 28 U.S.C. § 1367.

ARGUMENT

THE COURT OF APPEALS DECIDED THE QUESTION OF WHETHER THE PETITIONER WAS SUBJECTED TO DISCRIMINATORY DISCIPLINARY ACTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In its decision affirming the summary judgment granted to the Respondents on all counts, the Court of Appeals acknowledged that '[e]vidence showed that other employees were treated more leniently than Heyward." (A-6.) The Court was referring to the seven other employees of the DHEC who were terminated for abandonment during the period of Heyward's employment.

As noted by the Court of Appeals, Heyward contends that the other similarly situated white employees and male employees were provided with notice of pending termination for abandonment and were given more time to resolve the matter. (A-5.) The Court agreed that the white employees and the male employees, although eventually terminated, were either given notice of pending termination or more time to resolve the matter. (A-6.)

The Court upheld dismissal of the discriminatory termination claims, however, on the ground that these employees who were treated more favorably than Heyward were not similarly situated to Heyward.

In deciding that Heyward was not similarly situated to the more favorably treated employees, the Court of Appeals compared Heyward's circumstances especially to those of the two white female employees. The Court observed that one of these employees was on leave of absence status due to a family illness, and the other employee went on medical leave without pay due to a work-related injury. (A-7.) The Court then stated erroneously that "Heyward, on the other hand, did not provide her employer any reason for her absence." (A-7.)

In its discussion of the comparison between the disciplinary treatment of Heyward and the white employees and male employees of DHEC who were disciplined for job abandonment, the Court of Appeals proceeded on the erroneous premise that "she [Heyward] must show that they [the other employees] are similar in all relevant respects." (A-7.) Accordingly, the Court of Appeals placed undue emphasis on the fact that different supervisors were involved in Heyward's situation and that of the other employees. The Court also stressed inconsequential differences between Heyward's case and those of two white female employees, even though all three cases arose from sick leave or leave due to illness in the family. Such a "similar in all respects" standard adopted by the Court of Appeals is in conflict with the less rigid standard of "comparability" which has been accepted by this Court.

This Court has stated:

> Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other "employees involved in acts against [the employer] of *comparable seriousness* . . . were nevertheless retained . . ." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext. 411 U.S., at 804, 93 S.Ct., at 1825 (emphasis added).

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 283 n.11 (1976).

The Court of Appeals' use of the more demanding "similar in all respects" test in this case was in conflict with the "comparability" test adopted by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and *McDonald*. This error led directly to an erroneous affirmance of the dismissal of Heyward's Title VII claims on summary judgment. Under Rule 10(c) of the Rules of the Supreme Court of the United States, this conflict between the Court of Appeals' decision in this case and relevant decisions of this Court on an important question of federal civil rights law affecting many pending and future claims under Title VII of the Civil Rights Act of 1964, weighs in favor of granting this Petition.

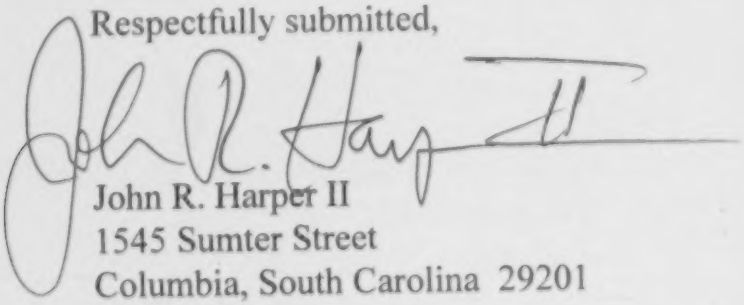
Moreover, the Petitioner invokes Rule 10(a) of the same rules in support of her Petition, since the Court of Appeals' application of a "similar in all respects" standard in this case is at odds with the "comparability" test which other Courts of Appeals have employed in cases of this kind. *See Hargett v. Westminster Bank, USA*, 78 F.3d 836, 839-40 (2d Cir.), *cert. denied*, 117 S. Ct. 84 (1996) (comparable seriousness test allows consideration of positions held by employees, as well as acts committed by them); *Worthy v. United States Steel Co.*, 616 F.2d 698, 703-04 (3d Cir. 1980) (claim alleging discriminatory suspension and demotion remanded for findings as to whether conduct of white workers was of comparable seriousness to conduct of black plaintiff); *Corley v. Jackson Police Department*, 566 F.2d 994, 998-99 (5th Cir. 1978) (district court erroneously ruled for defendants in discriminatory discharge case brought by black employee without considering evidence that white employees committing acts of comparable seriousness were not investigated or discharged); *Friedel v. City of Madison*, 832 F.2d 965, 974 (7th Cir. 1987) (white police recruits dismissed for cheating on exams did not show that employer knew that minority or female recruits were engaged in acts against employer of comparable seriousness); *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484, 487-88 (8th Cir. 1998) (male nurse alleging discriminatory termination produced sufficient evidence to survive summary judgment; evidence showed that female nurse who engaged in misconduct that was different in type but of comparable seriousness to plaintiff's misconduct was treated more leniently); *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1519 (9th Cir. 1987) (district court erred in denying discovery motion filed by black plaintiff seeking personnel records

to show that white employees who engaged in misconduct of comparable seriousness as plaintiff's misconduct were treated more favorably); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988) (airline's termination of minority employee for alleged rule violation was pretext for race discrimination; "The fact that . . . other employees did not commit the exact same offense as McAlester, does not prohibit consideration of their testimony. It is sufficient if these employees did acts of comparable seriousness.").

CONCLUSION

For reasons discussed herein, the Petitioner respectfully requests that this Honorable Court grant her Petition for Writ of Certiorari.

Respectfully submitted,



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